SUPREME COURT, U. S.

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Supreme Court of the United States

OCT. TERM 1962

No. [redacted] 458

M. W. ZACK METAL COMPANY,

Petitioner,

against

SS BIRMINGHAM CITY, her engines, boilers, etc. and BRISTOL CITY LINES OF STEAMSHIPS, LTD., and THE JARKA CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUDGE AND THE ASSOCIATE JUDGES OF THE UNITED STATES SUPREME COURT:

The Petitioner, M. W. Zack Metal Company, respectfully prays this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit to correct apparent misapplications of law of importance to commerce and to the nation by said Court of Appeals, Second Circuit, in affirming the final decree of the United States District Court for the Southern District of New York dismissing the libel of the petitioner in admiralty to recover for damages to a cargo of steel sheets carried by the *SS Birmingham City* on a voyage from Avonmouth, England, to Hoboken, New Jersey, commencing April 25, 1953.

a. Opinions Below

There were two appeals to the Honorable Court of Appeals below in this case, both from dismissals of the libel by the same trial judge in the District court. The first decision of the Court of Appeals reversed in part, modified in part, and vacated the decree on the first decision of dismissal of the trial court and remanded the case for further findings on particular fact situations; while the second, affirmed the second decision of the trial court even though that second decision was a mere repetition of the first and a plain refusal by the District court to carry out the mandate of the Court of Appeals. Involved was the proof of damage and the burden of proof of damage to cargo at outturn as affected by the Carriage of Goods by Sea Act of 1936, 46 U.S.C.A. 1303(6). Neither decision of the District court is offically reported, but the second decision appears at 1962 Am. Cas. 925. The first decision of the Court of Appeals appears at 291 F. (2) 451, and the second at 311 F. (334). All four decisions are appended hereto.

b. Jurisdiction

i. The final decree of dismissal upon the affirmance was entered in the office of the Clerk of the United States District Court for the Southern District of New York on the 27th day of February, 1963.

ii. The order of the Court of Appeals denying a rehearing was made on the 23rd day of January, 1963.

iii. It is believed that the provisions of Title 28 U.S.C.A. Section 1254, subdivision 1, confers upon this Honorable Court jurisdiction to review the final decree in question by a grant of this petition for a writ of certiorari to the Court of Appeals, Second Circuit.

c. The Questions Involved

1: Should the supervisory powers of this Honorable Court be exercised to correct the precedents established by the second decision of the Court of Appeals in the following matters:

(a) Where one panel of a multi-panelled Court of Appeals has already determined the existence of damage to libellant's cargo on the evidence in the case, may a later panel of the same court under the guise of "interpretation" refuse to recognize the legal effect of the prior panel's holding on the same evidence though corroborated by additional proof consisting of direct evidence of the same damage?

(b) May a Court of Appeals so far sanction a departure from the "clearly erroneous" rule as established by Rule 52 of the Rules of Federal Civil Procedure and by the decided cases of this court as to affirm a conclusion of law as a finding of fact protected by said Rule 52?

(c) May a Court of Appeals sanction a departure by the trial court from its duty to find the subsidiary facts dispositive of this case in spite of the duty imposed upon it by a prior panel of the Court of Appeals to find the facts in certain specified areas of inquiry and also, in spite of the general duty of the trial court to find the subsidiary facts by reason of Rule 46½ of the General Admiralty Rules of the Supreme Court and by Rule 52 of the Rules of Federal Civil Procedure, and by the decided cases of this court?

(d) May a Court of Appeals so far sanction a departure by the trial court from its duty to dispose of a case upon the facts before it as to affirm a decision which strikes all the evidence of damage before it as incredible, regardless of whether that evidence consists of admissions of the opposing party, of documentary evidence, of deposition evidence, whether it is evidence vouched for by the opposing

party as in the case where the evidence consists of testimony of that party's witnesses, or whether the evidence is reasonable or fair, and whether it remains uncontradicted and whether given by interested or disinterested persons and regardless of whether the burden of proof was on the libellant or respondent and particularly where the only proof of the state of the steel at outturn was of damaged steel and no other, which departure is contrary to the rule of the decided cases in this court and in other circuits.

2. Does the refusal of the Court of Appeals to recognize the exceptions to the cargo filed by the stevedores before unloading the vessel and the exceptions filed by Erie Railroad employees in behalf of the petitioner at outturn, as *prima facie* evidence of damage, requiring the respondent carrier to exculpate itself from blame, decide an important Federal question which has not been, but should be settled by this Honorable Court because of the provisions of the Carriage of Goods by Sea Act of 1936 relating to notice of loss and burden of proof as stated in 46 U.S.C.A. 1303(6).

d. Constitutional Provisions, Treaties, Statutes, Ordinances or Regulations Involved

Statute relating to the jurisdiction of this court.
28 U.S.C.A. 1254(1)

Section 1254. Court of Appeals, certiorari; appeal; certified questions.

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendering of judgment or decree; • • •

Rule 46½ of the General Admiralty Rules of this Honorable Court

Rule 46½. Findings of fact and conclusions of law.

In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the Appellate Court under rule 49.

Rule 52 of the Rules of Federal Civil Procedure

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

* * * * * *

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *

Carriage of Goods by Sea Act, 46 U.S.C.A. 1303(2)(6)

Section 1303. Responsibilities and liabilities of carrier and ship.

* * * * * *

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

* * * * * *

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading. * * *.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

Admiralty Jurisdiction Statute, 28 U.S.C.A. 1333(1)

Section 1333. Admiralty, maritime and prize cases.

The district courts shall have original jurisdiction, exclusive of the courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entities. * * *.

Jurisdiction of the Court of Appeals, 28 U.S.C.A. 1291 and 1392

Section 1291. Final decisions of district court.

The Courts of Appeals shall have jurisdiction from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands except where a direct review may be had in the Supreme Court.

Section 1292. Carriage of Goods by Seas Act 1936.

(a) The Courts of Appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

e. Statement of the Case

On April 21-24, 1953, the respondent ocean carrier received 264 bundles of cold rolled sheets of steel in two lots for carriage from Avonmouth, England to Hoboken, New Jersey. Petitioner became the purchaser thereof on or about April 24, 1953. A clean bill of lading was issued for the shipment. Libellant proved without contradiction that the sheets at the start of their voyage to America were clean, bright, newly milled steel, oiled and properly packed, first, in waterproof paper wrapping and trumpeted and then, enveloped in heavier steel sheets strapped on the outside in the usual manner. This good order and condition of the steel on delivery to the carrier at port of loading is established by the Court of Appeals.

Upon arrival at Hoboken, petitioner employed Erie Railroad to receive this shipment at Hoboken and to transfer it to Detroit. The record shows without any contradiction that at Hoboken and while the steel was in the possession of the carrier the bundles were observed to have been broken up in stow, the steel sheets inside the bundles had spilled out of their envelopes onto the floor of the deck, the sheets were placed back into the envelopes and restrapped; that both the paper lining and outer coverings were broken, and the bundles of steel were delivered at outturn with the steel inside exposed, the bundles were mishapened and the steel inside was also rusted and wet and damaged. The Erie lighterman filed exceptions to the condition of the steel in writing noting exceptions in the delivery book. The stevedores had also filed exceptions in writing to the condition of the steel even before that, on the unloading of the steel from the ship. The stevedore and the ship held a survey of the cargo on arrival because the ship had met heavy weather and the cargo had suffered damage. A report of the ship's surveyor's findings was placed into evidence as respondent's Exhibit I.

The Erie delivered the steel at a warehouse at Detroit, where the contents of the whole shipment of 264 bundles was inspected and found to be wet, rusted and rust-stained or water marked, torn, bent and crimped and the bundles misshapen, with covers torn, open and bent, and restrapped.

This kind of steel at this period of time was in very short supply. Libellant tried to deliver the same to its customers and all but 77 bundles were accepted and this suit is for the damage to the 77 bundles returned. The cause of the damage found at Detroit was stated by experts to be the breakage of the bundles in stow in the ship, the exposure of the steel sheets to atmospheric and moisture conditions, the failure of the ocean carrier to wipe off the sheets, reclose the bundles and restrap them tightly, and the delivery at outturn by the carrier with covers torn, steel exposed and bundles in disheveled condition. All this evidence of damage remains uncontradicted. There was no evidence at all that at the outturn the steel was clean, bright, free from rust or other defects or in as good condition as when it had been received by the respondent at loading.

The trial court, in its first decision, dismissed the libel saying in respect to the respondent's duty to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried, "that there is no credible evidence that the steel that is involved in this case was discharged from the ship either crimped, wet, rusty or in otherwise damaged condition". It had nothing to say of the disheveled condition of the bundles at outturn as a cause for the damage at Detroit. Upon appeal, the Court of Appeals reversed the trial court and remanded for findings of subsidiary facts saying that the evidence raised the possibility that if the steel was not already rusted at the time of discharge, the rusting found at Detroit might have been caused by the conduct of the respondent or the stevedoring company. The reviewing court said that

libellant had introduced "ample evidence that some of the steel bundles had become undone in the course of the voyage and in the unloading. Perhaps this condition permitted an exposure to moisture which resulted in the development of rust during the period after discharge from the ship. Furthermore, two of libellant's witnesses testified that the rail shipment in open cars from New York to Detroit would not ordinarily produce rust unless the packaging was deficient in some respect. If the unsatisfactory condition of the bundles was not remedied before respondent delivered the steel for shipment to Detroit, respondent might be chargeable with responsibility for rust developing as a result of the defective packaging. None of these problems is met by the district court's terse statement dismissing the libel. Libellant's case was sufficiently substantial to require detailed findings of fact, and it was error to dispose of the case summarily on the brief oral statement quoted above." After delineating six areas of facts to be sifted by the trial court, it said further "Specific findings of fact and conclusions of law should be made as to all points of substance raised by the evidence."

On the remand additional evidence was adduced by libellant. No evidence was offered by respondents. This additional evidence was the testimony of the Erie Railroad captain of the barges, who took delivery of the steel from respondents, and the Erie Railroad checker, who on the day following delivery of the steel to Erie, loaded the steel onto the railroad cars that was to take the steel to Detroit. The Erie captain had signed for the delivery of the steel noting exceptions to the good order and condition in writing in the delivery book. He said all covers of the bundles were torn and he believed the steel to be damaged. The Erie checker stated that the steel inside was exposed because the coverings, both paper and outer steel sheet were torn and the steel inside was exposed and he said that the steel was rusted and all bundles were misshapen. Both Erie employees testified to direct visual

observations of the steel. Both made a record of their observations at the time, called "tallies". These records were placed in evidence. Also on the remand the testimony of Tour, a metallurgist and consulting engineer and packaging expert was given. He said that on the basis of conditions prevailing on board the ship as revealed by the ship's logs, that moisture sufficient to have damaged the steel in the manner found at Detroit was formed and deposited on these steel bundles on several occasions during the ocean transportation. Also, he stated, that the re-coopering done was insufficient to have removed these injurious causes of the damage and that the breaking of the steel bundles in the ship was a sufficient force to cause the bundles to break their integrity which meant that the moisture could, from that time, commence to attack the steel.

On this new state of the record the trial court elongated the decision but again failed to find the actual state of the steel and its wrappings at outturn. Its decision of dismissal was again predicated upon its conclusion called Finding No. 22: "There is no credible evidence that the steel that is involved in this case was discharged from the ship either crimped, wet, rusty or in otherwise damaged condition". This was a mere repetition, word for word of what it had said before. Again, it had failed to find the subsidiary facts regarding the state of the steel at outturn, and the effect of that condition as a cause of the damage to the steel sheets admittedly found damaged at Detroit.

The Court of Appeals in its second decision, after observing that this repeated finding went to the heart of the case said: "We think it was quite proper to dispose of the basic issue of damage at outturn by finding that no credible evidence that the 77 bundles of steel involved in this case were discharged from the vessel at Hoboken either crimped, wet, rusty or in otherwise damaged condition. * * * Finding 22 necessarily includes a rejection of

the contention so vigorously urged by the cargo owner on the previous appeal, to the effect that a tearing of the paper envelope and a breaking or displacement of the waster sheets, if such a condition existed at outturn, might have been the cause of a subsequent rusting of the inner oiled steel sheets such as was discovered at Detroit".

Thus, the second panel of the Court of Appeals disregarded what a prior panel had settled about the statement that "There was no credible evidence" of the damage not being dispositive of the case and that the evidence of damage was substantial enough to require findings of the subsidiary facts on the points of substance raised by such evidence. Here the point of substance was the state of the goods at outturn. There was no evidence whatever of good order or what would be more accurate, of the same order at outturn as on delivery to the carrier at port of loading. The only evidence of the state of the steel at outturn was as is described above, damaged. Consequently, this affirmance was made in disregard of the legal principles of the law of the case, the "clearly erroneous" rule and the burden of proof as established by the Carriage of Goods by Sea Act, and it has given rise to this petition.

f. Jurisdiction of the Court of First Instance

The United States District Court for the Southern District of New York had jurisdiction because this is a suit in admiralty, 28 U.S.C.A. 1333 (1), and the respondents were found within the jurisdiction of that court subject to its process.

g. Argument

1. Should this honorable court exercise its power of supervision in this case.

As is said in the second decision of the Court of Appeals, this is a common type of cargo damage case. While the

author of that opinion may have had in mind that this is not the unusual situation that could automatically command the attention of this honorable court, yet the truth of its commonness is established (see the discussion under subpoint 2, *infra*) and thus at least, points up one element necessary to require the attention of this court, namely, the great economic importance of this type of case within our national economy. Couple this fact with the fact, which it is hoped will be proven to this court's satisfaction, that the trial court, twice, and the Court of Appeals in its second decision, seriously erred in law, in the disposition of this case, the matter should qualify for and deserve the consideration of this court on its merits. This court is assured that a grant of this petition will not be found improvident. Petitioner has successfully proven its case, proving, without contradiction, in fact, proving, with the help of respondent's witnesses and documents, that the carrier failed to re-deliver petitioner's steel at outturn in the same good order and condition as when received at port of loading. This is a cargo damage case where the carrier, as bailee of the goods, has the extraordinary duty of explaining away and exculpating itself once enough proof has been given from which damage may be lawfully inferred to the subject of the bailment while within the possession of the bailee.

Gilmore & Black, The Law of Admiralty, pages 162-163;
The Vallescura, 293 U. S. 296.

The proof shows that at Detroit, some seven to ten days after outturn at Hoboken petitioner's steel, all 264 bundles of it, was found to be damaged by rust, water-markings, crimping and denting. This damage at Detroit was found by all courts below. At outturn or before, it was shown by the deposition testimony of witnesses produced by the carrier and by documents supplied by the carrier that the bundles of steel had broken up in the ship's hold because the stow had broken, that the sheets had spilled from their

wrappings as a result of the breaking of the stow and there was an effort made by the carrier and its stevedore at re-strapping the bundles, that at outturn, the envelopes were torn and the bundles delivered with skids and straps broken. It was also shown by direct evidence that the steel at ship's outturn at Hoboken was wet and rusted and the wrappings torn, bent and not wholly covering the steel inside, with skids and straps broken. All of this evidence remains undisputed. It was sufficient to have made out libellant's *prima facie* case and to oblige the carrier bailee to come forward with proof of its non-liability. That it did not do so is a fact of record. It did not produce any evidence and there was no evidence to the effect that at outturn at Hoboken the steel was in good order, bright, free from rust or defects or that the envelope wrappings were in as good order and condition as when they had been received. Indeed, the carrier joined in the statement of facts that the bundles had been recoopered at Hoboken before outturn, that the stow had broken before that and steel sheets had been spilled. The stevedore took exceptions to the state of the steel even before it unloaded the steel from the ship, and reported its rust condition to its insurance company. Neither respondent contradicted the direct testimony of the Erie Railroad employees or of Krasnow, petitioner's former employee, who had seen the steel at the respondent's pier at Hoboken and said the same was rusted and wet and that the envelopes, both paper and steel, were torn and that such condition exposed the steel inside. Yet, respondents had at least a dozen persons in their employ who had seen the steel between ship's arrival and outturn. The second decision of the Court of Appeals which is the decision under review, instead of recognizing the only facts respecting the state of the steel at outturn that was before the court affirmed the trial court's refusal to find the subsidiary facts concerning the state of the steel and its wrappings at outturn and also affirmed the trial court in its insistence on dismissing the

libel by repeating its former conclusion that there was no "credible" evidence of damage at discharge. Yet, the trial court had been directed to find the subsidiary facts on the questions raised by the evidence by the first panel of the Court of Appeals which had also held that the trial court's finding of no credible evidence failed to dispose of the issues raised by the evidence. Accordingly, the last decision of the Court of Appeals was erroneous. Plainly, one error is that it treated this conclusion as a finding of fact. Thus it imbued this conclusion of law with the protection which Rule 52 gives all findings of fact of the trial court respecting the credibility of witnesses. Also said second decision was made in violation of "the Rule of the Case" principle, an error first made by the trial court upon its reconsideration. In disregarding the plain holding of its prior decision and by its attempt at sitting in review upon the same, the Court of Appeals went beyond its jurisdiction. It also violated the rule prevailing in other circuits and the rule established by cases decided in this honorable court concerning undisputed, uncontradictory evidence, which is fair and reasonable, and which has always been considered to be binding upon the court and not to be disregarded arbitrarily. The said decision of the Court of Appeals under review also violates the mandate of the Carriage of Goods by Sea Act, subdivision 6, which legislates the burden of proof of damage to cargo at delivery and establishes presumptions in favor of the parties under the circumstances therein mentioned. For these reasons this court is respectfully asked to exercise its power of supervision in this case.

McNabb v. *United States*, 318 U. S. 332, 341;
Offutt v. *United States*, 348 U. S. 11.

a. The violation of the Law of the case.

There can be no question about the fact that the trial court on remand failed to dispose of this case as the Court

of Appeals had directed to be done and that instead the trial judge repeated its failure to sift the evidence in relation to the condition or state of the bundles at outturn as a cause for the damage found at Detroit and repeated verbatim, the same conclusion of law about there being no credible evidence of damage at discharge as it had on the occasion on the first decision. Instead of protecting the mandate of the Court of Appeals, a different panel on the second appeal to that court, commended the trial court. It said it had done exactly what it had been directed to do, but the second panel then interpreted the first decision as one which had made no direction to find the facts respecting the state of the steel at outturn to determine whether or not that could be a cause for the later found damage. This was obviously erroneous as a plain reading of the first decision will show.

Also, the second panel, contrary to the way the first panel had treated this finding of "no credible evidence", treated it as a finding of fact, instead of a conclusion of law as had been done by the prior panel. Treating it as a finding of fact, it could imbue it with the protection of the "clearly erroneous" rule and it did so. Yet, a conclusion of law is reviewable and will be reversed if erroneous. The reviewing court has the duty to examine the record to determine whether there is substantial evidence to support the legal conclusion of the trial court and the reviewing court is free with respect to the application of the law to the facts, to substitute its own judgment for that of the trial court.

Stern, Review of Findings (1944), 58 Har. L. Rev. 70, 75, 89, 93, 113, 117;
Palmer v. *Conn.*, 311 U. S. 544, 558;
Morimurra Arai & Co. v. *Taback*, 279 U. S. 24, 33;
I.C.C. v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91;
Yakus v. *United States*, 321 U. S. 414, 427;
Bogardus v. *Commissioner*, 320 U. S. 34, 39.

On the other hand, a finding of fact may not be set aside by an Appellate Court, unless "clearly erroneous".

U. S. v. *U. S. Gypsum Co.*, 333 U. S. 364, 395.

Calling a statement of the trial court a finding of fact does not make it so nor can it obscure the diverse elements that enter into the application of the legal tests for that fact. Subsidiary facts must be found to support the ultimate fact or there will be no support for that conclusion.

U. S. v. *Appalachian Electric Power Co.*, 311 U. S. 405.

Stern says that where a judge must apply the law to a fact situation to determine another fact or where the fact in issue is a general fact which requires the application of law to determine one of its components, the result is a mixed question of fact and law.

Stern, id., pp. 96, 97.

A mixed question of fact and law is like a conclusion of law, a subject open to correction by the Court of Appeals if erroneously decided by the trial court.

Murray v. *Noblesville Mining Company*, 131 F. (2) 470, 474, cert. den. 318 U. S. 775;
Kuhn v. *Lida*, 119 F. (2) 704.

In *Murray* v. *Noblesville Mining Company, supra*, the Court said:

> "* * * but the rule (Rule 52) does not operate to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings."

The holdings of the Court of Appeals, made on the first appeal were holdings which neither the trial court nor the

second panel of the Court of Appeals were free to disregard. Only this honorable court as a court of higher authority could sit in review upon that first decision of the Court of Appeals. Until reversed, that decision was binding upon the trial court and upon itself since it established the law of this case. *Messinger* v. *Anderson, infra.* The second panel did not attempt to reverse the first panel it is true; but then, it should not have, under the guise of interpretation, nullified its clear holding. A Court of Appeals is a statutory court limited in its powers to those conferred on it by the statutes. The statute granting the United States Courts of Appeals its powers of review are generally speaking Sections 1291 and 1292 of Title 28 U.S.C.A. In either statute will there be found a power of review over its own prior decision on the same or similar facts.

The necessity for the rule of Stare Decisis is founded on consideration of expediency and sound principles of public policy, to preserve harmony and stability in the law. It is indispensable to justice, especially when it is a finding by a court of last resort, that a question once deliberately examined and decided, should be considered as settled and closed to further argument.

21 C.J.S. Courts, Sec. 170.

The Law of the case means the opinion on a former appeal, it is binding until overruled by a higher court.

21 C.J.S., Courts, Sec. 195;
Messinger v. *Anderson*, 171 Fed. Rep. 785, rev. on other grounds, 225 U. S. 436.

Where evidence on a second or succeeding appeal is substantially the same as that on the first or succeeding appeal, all matters, questions, points or issues adjudicated on the prior appeal are the law of the case on all subse-

quent appeals and will not be reconsidered or readjudicated therein.

36 C.J.S., Federal Courts, 297.

In support of this statement, Corpus Juris Secundum cites, under note 83, a total of 97 cases decided by the Federal Courts.

Accordingly the second panel of the Court of Appeals so far departed from the accepted and established principles of law as to permit itself and the trial court to disregard the law of the case and to decide, without jurisdiction, differently then the first panel had done. This court will do well to review the action to avoid the setting of such a dangerous precedent which will have an unsettling influence on the decision of our Federal courts of appeals.

b. The sanctioning by the second panel of the trial court's departure from the rule requiring it to make special findings of facts and conclusions of law upon all substantial points raised by the evidence was so erroneous as to call for this court's exercise of its supervisory powers.

It has never been the rule of this court that a trial judge has the unbridled power to disregard all the evidence of the case on the ground that it lacked credibility regardless of whether the testimony was oral or documentary, or was given in person in court or by deposition and whether it is vouched for by the adversary party and whether given by interested or disinterested witnesses, whether the evidence is circumstantial or direct and whether it is reasonable and fair or inherently improbable and regardless of whether it is undisputed, admitted or remains uncontradicted and regardless of legal presumptions which may be raised and supported by that evidence. Nor has it been the rule of other circuits. Yet, that is the rule or principle laid down by the second panel in this case.

On the critical question of whether the carrier had or had not failed to deliver the steel in question in as good a condition as when it had received the steel, the state of the steel and of its packaging at outturn, in the light of the undisputed and accepted evidence of damage at the end of the overland carriage to Detroit, would be a substantial point of inquiry raised by the evidence. Evidence was given of the condition of both the steel and of its wrappings at outturn. That evidence was of all one character, viz.; that both the steel and the wrappings were damaged. That evidence was the deposition of the captain and mate of the vessel to the effect that the bundles of steel in question had broken their stow and the sheets of steel had come out of their wrappings and had spilled onto the floor of the deck where stowed. Then these sheets had been put back within the covers and restrapped. The pier superintendent employed by the carrier stated that this method of recoopering was the only recoopering done, that none of the steel sheets had been wiped, nor had the waterproof paper been replaced. The captain testified that he had filed a protest on arrival because he had met heavy weather on the way over, and because he had shipped water all over his ship and that he feared damage to both ship and cargo. One of the stevedore gang-bosses said he observed some of the bundles in broken condition, with the sheets loose and exposed and that he observed that the sheets had been coated with oil. Some of this steel he said was rusty. All this testimony was taken by deposition and of course, each witness was vouched for by the respondents as the testimony was offered by them. Respondents called to the trial only one witness who saw the steel. He was a vice-president of the stevedoring concern. He stated that he had arrived aboard the ship after most of the steel had been discharged to the pier. He did not describe the state of the steel he saw. On cross-examination he was asked if his memory of the state of the steel could be refreshed from the written report of a survey

which had been made by a ship appointed surveyor which report stated that the steel in question had broken in stow as evidenced by the irregular and open lay of the bundles, and the witness said he remembered that that condition was true.

The evidence of damage also consisted of the written exceptions filed by the stevedores to the carrier made at the unloading of the steel in question which read "11 bundles recoopered; 56 bundles skids and straps broken". This was libellant's exhibit 10.

Also, said evidence of damage consisted of the ship's surveyor's report which stated that his survey was made because of the damaged cargo and in it he made the foregoing statement about the steel in question having broken its stow. The report also stated that the steel had been delivered to consignee's representative against exceptions in writing reading "11 bundles re-coopered; 36 bundles skids and straps broken". This report is Respondent's Exhibit I.

Such evidence of damage also includes the written exceptions to the delivery of the steel at outturn taken by the Erie Railroad man, which exceptions read "11 bundles recoopered; 36 bundles skids and straps broken". This is respondent's Exhibit C.

It also consisted of the captain's protest which read "Encountered moderate to high seas with vessel rolling and pitching and shipping water over-all and fearing damage to ship and cargo". This is libellant's Exhibit 9.

Also, the report of the stevedores to their insurance company which stated "Description of Damage—Many bundles of steel sheets found in stowage with skids broken and straps broken. * * * Some bundles were found loose in stowage and required extra handling and rebanding, many bundles found in rusted condition". This was libellant's Exhibit 15.

All of the foregoing evidence was evidence vouched for by the respondents. Yet, it was held "incredible" by the trial court in its decisions.

There was a great deal more evidence of damage. There was the direct evidence of Krasnov, a former employee of the petitioner, who saw the steel as it was being unloaded to the dock, and again three days later, when it was being placed onto the Erie lighter at the same dock. He described the bundles as broken, covers were torn, the paper lining was torn, the steel inside was exposed, many straps and skids were broken, and he described the steel sheets themselves as wet and rusty. This man's testimony was singled out by the trial court in its first decision as incredible and his testimony was stricken. In the second decision, no special mention of this man's testimony was made by the trial court. Apparently, the trial court had changed its mind about the credibility of this man, because the Erie Railroad lighterman identified him as the man who had responded to his call for instructions which he had made to his employer on the morning when he had called for the steel, to ask what to do with the steel which he said was damaged. Krasnov had come in answer to that call. This was the occasion of his second visit to the steel at Hoboken. Consequently, it would be fair to infer that the trial court had changed its mind about the incredibility of Krasnov's testimony.

Also, there was the testimony of the president of the libellant who had surveyed the steel on arrival at Detroit along with the warehouseman to whom the steel was consigned at Detroit. Both stated that the whole lot of 264 bundles were rusted, water-stained and bent and crimped to varying degrees of damage ranging up to 85%. Each was an expert on steel and causes of its damage in transit and testified that the damage they saw was ship-board damage and that in no event could it have happened on the overland rail carriage had the steel been delivered at

outturn in bundles as good as when they were delivered to the carrier.

Also, there were two other experts who stated that had the steel bundles been in as good a condition at outturn as when they were at delivery to the carrier at loading they would have travelled the overland rail journey without damage.

This was the extent of the evidence of damage in the first record. All of the foregoing evidence is the evidence which the trial court in its first decision said was incredible but which the first panel of the Court of Appeals said was "ample evidence that the bundles had become undone" and might account for the damage at Detroit, and was substantial enough upon which to make special findings of facts etc. On remand, as stated above, additional direct evidence of damage was adduced and another expert also testified. This additional direct evidence of damage consisted of the testimony of two Erie Railroad employees who saw the steel at outturn and said it was rusted and said that all covers were torn and bent and the steel exposed to the elements, and the skids and straps were broken. Both employees made written records of their observations for their company's files. These records were placed in evidence as respondent's Exhibits J, K & L and libellant's Exhibits 22, 23 and 24. The latter clearly state that steel sheets were rust stained in all bundles. The former clearly states that all covers were torn.

The expert who testified on remand was Mr. Tout identified above as a metallurgist, consulting engineer etc., who from the record of the atmospheric conditions prevailing according to the ship's logs, stated that at several times during the voyage enough moisture had been deposited (on one such occasion, he calculated that 1/16 of an inch of moisture had been deposited on the steel) on the steel to injure it and as the captain and the mate had testified that the steel had broken its stow that such mois-

ture had certainly penetrated inside the bundle. He categorically stated that these bundles were wet on arrival at Hoboken, which statement corroborated Krasnov's statement to that effect. He also stated that the disheveled condition of the steel and its wrappings at outturn and the type of recoopering done could have been the competent producing causes for the damage found at Detroit, and that if the steel bundles had been delivered at Hoboken in as good a condition as they were in at Avonmouth that they could have travelled to Detroit unharmed and the damage found at Detroit would not have occurred.

There was no evidence whatever contradictory of any of the statements of these witnesses whether called by libellant or by respondent or whether stated in the documents emanating from respondent or from the Erie Railroad or from other sources. There was no evidence of any state of the steel at outturn other than that it was damaged. Nor was there any evidence contrary to the evidence that the delivery at outturn, with torn covers and steel exposed, was the cause of the damage at Detroit.

Yet, the trial court twice refused to consider the evidence connecting the damage at Detroit to the state of the steel at respondent's outturn at Hoboken and twice it repeated its conclusion that there was no credible evidence of damage. Leaving aside the refusal of the trial court to make findings of the subsidiary facts on the state of the steel at outturn and considering whether it had the power to disregard all the evidence of the case on the ground that it lacked credibility, the trial court erred in assuming such power and the Court of Appeal in its second decision erred in affirming that there was such power in the trial court.

A trial court does not have the arbitrary power to decide credibility with respect to admitted facts, undisputed facts, documentary facts and deposition evidence.

The Court of Appeals in the second decision seems to find some comfort out of calling this evidence unreliable and uncertain, but neither the trial court in either decision nor the Court of Appeals on its first consideration had found this evidence in anyway uncertain. Indeed, the first panel had sifted the evidence and had concluded that it was ample and substantial and raised points to be adjudicated. It is obvious that the second panel's reliance on name calling was aimed at justifying its decision. Yet the principle remains that the undisputed evidence of a case may be conclusive upon the court.

Kelly v. *Jackson*, 6 Pet. 22, 8 L. ed. 523.
Chesapeake & Ohio R. v. *Martin*, 283 U. S. 209, 216.
Dickstein v. *McDonald* (3rd Cir., 1958), 149 F. Supp. 580 aff'd 255 F. (2) 640.
Miller v. *Comm'r.* (6th Cir., 1953), 203 F. (2) 350, 353.
Clemons v. *Board of Ed.* (6 C.A., 1956), 228 F. (2) 853, cert. den., 350 U. S. 1106.
N.L.R.B. v. *Ray Smith Trans. Co.* (5th Cir., 1951), 193 F. (2) 142, 144.
Nicholas v. *Davis* (10th Cir., 1953), 204 F. (2) 200, 202.
Twentieth Century Fox Film Corp. v. *Dickhaus* (8th Cir., 1956), 153 F. (2) 893, 899-900, cert. den. 329 U. S. 716.
U. S. v. *Johnson* (5th Cir., 1953), 208 F. (2) 729, 730.
Gallegos v. *Nebraska*, 342 U. S. 55, 61:
Cf. Orvis v. *Higgins* (2nd Cir.), 180 F. (2) 537.

Where the evidence was undisputed, uncontradicted, unimpeached, reasonable in the light of all other facts, and its credibility was in no way brought into question, credibility is not an issue and the testimony may not be re-

jected. The facts thus proven are the facts to which the rules of appropriate law should be applied. When direct proof of a positive fact is given and it remains unchallenged by contrary proof or by destructive analysis, it is the duty of the fact finder to accept the fact and decide in accordance therewith. This is the established principle of law stated in the cases cited above ascribed both to this court and to the courts of the several other circuits mentioned. In this case, as has been urged so strongly, the only proof of the state of the steel and its wrappings at outturn was that they were in damaged condition and as this evidence remains unchallenged except by the argument of respondent's counsel, the evidence should have been considered conclusive upon the court. To state the proposition in another way there is no evidence to support a conclusion that the steel and wrappings was in as good a condition as when received. The conclusion to that effect in this case would be unsupported; not only unsupported by substantial evidence, but unsupported by any evidence, not even by the proverbial scintilla evidence.

All the evidence of damage in this case then, is just as open to the Court of Appeals from which to draw conclusions of law as it is up to the trial judge. In fact, it is the duty of the Court of Appeals to review such a conclusion of the trial court and to reverse, if it is erroneous.

Stern, supra.

The trial court's power to pass upon "credibility" as stated in Rule 52 is to the effect that an appellate tribunal shall give due regard to the opportunity of the trial court to judge of the credibility of the witnesses. This can only mean that he is sole judge of the demeanor evidence where the testimony of live witnesses is involved.

Broadcast Music Inc. v. *Havana Rest. Corp.*, 175 F. (2) 77, 80.
Orvis v. *Higgins, supra.*

Neither case extends the power of a trial court to reject the evidence as incredible any further than upon a consideration of the testimony of live witnesses. Even in that area, the reason for the rule must be considered. The trial judge has the advantage over the Appellate Court of observing the demeanor of the witness, from which demeanor, the trial judge might be convinced that the evidence is contrary to the stated evidence. At least, then, the demeanor of the witness belies the words he uttered. Consequently, there is an issue of veracity raised and the trial judge would be within his right to find contrary to the spoken word. When, however, the evidence is admitted or undisputed, or the facts probative of an ultimate fact favorable to a party is advanced by the adversary, or by the adversary's documents, or by its own documents or by depositions, the occasion to use this advantage of the trial court disappears. Credibility is not an issue and there is no "dispute" in the facts. The Court of Appeals is here in as good a position as the trial court, to draw the proper legal inferences and apply them to the facts evidenced. In the *Broadcast Music Inc.*, case, *supra*, the late honorable Judge L. Hand said he would uphold a trial court's decision in judging of the credibility of a live witness' testimony even if it were arbitrary. Unquestionably, that is going too far. The object of a trial is to find the truth. If a trial court acted arbitrarily, it would not be finding the truth. Thus error would be made. Yet, that statement is not as far off the path of the judicial duty to find the truth, as the decision of the trial court and of the second panel of the Court of Appeals is in this case. They are arbitrarily disregarding all of the evidence of the state of the steel at outturn regardless of whether it is the kind reserved for the trial court under Rule 52, and regardless of the rule of conclusiveness stated in the foregoing cases.

The affirmance of said finding No. 22, of no credible evidence, was placed upon grounds which are self-evident im-

provident applications of the relevant law. The second Court of Appeals said "As the trial judge frankly disbelieved at least some of Zack's witnesses, as he had good reason to reject the vague and inconclusive testimony of others as unsatisfactory, and as the documentary evidence was unreliable at best, we think it quite proper to dispose of the basic issue of damage at outturn by finding no credible evidence of such damage." If it is assumed that the Court of Appeals was referring to the testimony of some live witness, then, this statement would be applying the law, but as we see above most of the evidence of damage was of a nature concerning which credibility could not be questioned. What happened to all this evidence of damage which was made other than by the testimony of live witnesses? It spelled out damage at outturn even without the testimony of live witnesses. At least enough evidence of the unimpeached kind remained from which petitioner's prima facia case of damage at outturn could be made out.

It must not be overlooked as the trial court and the second panel of the Court of Appeals apparently did, that a common carrier is a bailee, and as such it has the burden of explaining the damage to the subject of bailment.

Comm. Molasses Corp. v. *N. Y. Tank Barge Co.*, 314 U. S. 104, 111.

Furthermore, as stated by this court in *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 368, 394, where the court below has misjudged the establishment of a *prima facie* case, an error of law has occurred. Such an error, it was stated, can be corrected by this court. Also, this court stated the "clearly erroneous" rule, saying that findings are never conclusive and that it is erroneous when on the entire evidence the reviewing court is left with the definite and firm conviction that a mistake has been made. At page 396, this court affirmed the freedom of the reviewing court to reassess a holding of the trial court on a mixed question of fact and

law It refused to uphold a finding because of the trial court's reliance upon a mistaken version of applicable law to the competency of the evidence.

The second panel of the Court of Appeals, it must be observed quoted this case but instead of following it, it followed the rule advanced in *United States v. Aluminum Company of America*, 2nd Cir., 1945, 148 F. (2) 416, to the effect that the Court of Appeals will reverse "most reluctantly and only when well persuaded." True, it changed its terminology to "we should only reverse when fairly well persuaded" but the point is that it did not apply the rule of this court in *U. S. v. U. S. Gypsum* but followed the "reluctance" rule it had previously established.

The failure to accord conclusiveness to the facts of this case which overwhelmingly proved damage to the steel and the wrappings at outturn was an error of law. The patent abandonment of its duty to review the facts upon a so-called power in the trial court to assess "credibility" where the claim is that there are no facts to support the trial court's conclusion of lack of credibility, is also an error of law. There was an obvious failure on the part of the second panel to understand the overwhelming nature of the evidence of damage to the steel and its wrappings vis a vis the failure of the carrier, to prove the contrary. The burden of proof is a matter of substance. Violate the rule and an error of law is committed. As enough was shown here to make out petitioner's *prima facie* case the burden of proving that the damage found at Detroit was not caused by any act for which it was responsible is upon the carrier. Consequently, it is submitted that this court should direct a review of this case because to allow this decision to hold would authorize district courts to decide cases arbitrarily, at the whim of the trial court, rather than on the basis of the legal quality of the evidence before it. It is obvious that this is the very result of the decision under question which has been accomplished by the simple expediency of giving the trial court the sole and exclusive

authority to decide the credibility of all evidence. Thus the mere announcement of "credibility" as a basis for its decision by the trial court, would deprive a litigant of all right of review. What then would stop the arbitrary use of that power if this decision is allowed to remain undisturbed? In this day and age when there is so much pride taken in the principle of rule by law, the decision under question represents a negation of that important principle. It creates a loophole by which one man may make a mockery of the law. The loophole should be corrected. There have been several cases in the second circuit tending to deny conclusiveness to undisputed evidence. Such cases have involved the testimony of live witnesses. This is the first case where that tendency has gone so far as to permit a trial court to disregard all evidence regardless of whether it is demeanor evidence or whether an issue of credibility has properly arisen. Other circuits do not subscribe to this principle. This court is urged to review the decision so that such an unfair rule is not established in the Federal system of laws.

II. Did the refusal of the Courts below to recognize the exceptions to the cargo at discharge decide an important Federal question which has not been but should be settled by this Honorable Court.

The Carriage of Goods by Sea Act of 1936 is Congress' acknowledgement of an important segment of our economy entitled to its protection from the existing abuses therein.

Under the common law, the ocean carrier was practically an insurer of the goods entrusted to it for carriage and to relieve themselves from such far reaching liabilities, carriers would require shippers to agree in writing to a limitation and reduction of that liability. Such agreements were never voluntary. They would usually be made as part of the bill of lading issued as a receipt for the goods to be carried. A contract that overreached the shipper or consignee would be struck down by the courts,

but by and large, much disproportionate shifting of responsibility for damage to the goods was shifted by those responsible for the damage to the innocent owner who could not throw off the responsibility to anyone else. Remedial legislation occurred in the passage of the Harter Act, in 1893 (46 U.S.C.A. Sec. 190 *et seq.*), and in 1936, of the Carriage of Goods by Sea Act (46 U.S.C.A. 1300 *et seq.*). This latter act will be hereinafter referred to as Cogsa.

> *United States* v. *Farr Sugar Corporation*, 191 F. (2) 370, aff'd sub. nom., *United States* v. *Atlantic Mutual Ins. Co.*, 343 U. S. 236.

Cogsa sets forth in Section 1303, Subdivision 2 the responsibilities and liabilities of the carrier and in subdivision 6 of that section it sets out a rule of evidence respecting the burden of proving the state of the goods at delivery by the carrier at discharge.

When the Court of Appeals, in its second decision, approved of the striking out of all evidence of the condition of the steel and its wrappings at outturn by the trial court on the ground that the latter is the judge of the credibility of such evidence, including the exceptions to the steel filed at discharge by both the stevedores and the Erie Railroad, did it not sanction a departure from the statutory establishment of a cargo owner's *prima facie* case of damage as provided in subdivision 6 of Cogsa. The pertinent provision reads as follows:

> "1303. Responsibilities and Liabilities of carrier and ship
>
> * * * * * *
>
> (6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be

prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

* * * * * *

Such notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection."

This section speaks of the *prima facie* presumption of good delivery, if no exception in writing to the good order and condition of the goods is taken on delivery. The burden of proof in a cargo damage case is always of extreme importance in the determination of where and upon whom the responsibility for the damage shall be found and placed.

Gilmore & Black, The Law of Admiralty, Chap. IV pages 162-163.

See Note, 27 Texas Law Review, 525 (1949).

A cargo owner is at a disadvantage to ascertain what happened to his goods for he cannot know of the damage until after he inspects them after delivery to a warehouse. The carrier has had the possession of the goods and when damaged within its custody it only can state what has occurred to cause the damage. At common law and before the Carriage of Goods by Sea Act, the rule was that once damage to cargo was found to exist or was traceable to the possession of the carrier, that the carrier had the burden of proving its non-liability for the damage including, the burden of separating the damage for which it was not liable from that for which it was in the case when there was damage from two or more causes not all of which were the carrier's responsibility.

The Vallescura, 293 U. S. 296.

This rule of throwing upon the carrier the burden of separating the damage for which it is not responsible from that for which it was, was affirmed since the passage of Cogsa in cases where the goods had left the carrier's possession and the extent of damage was noted thereafter, although the fact of damage had been noted at delivery by the carrier.

> *Armco International Corp.* v. *Rederi a/b Dis.*, 151 F. (2) 5, 8, (2 C.A. 1945).
> *Empresa Central Mercantil* v. *Rep. U. S. of Brasil*, 147 F. Supp. 778, aff'd 257 F. (2) 747, (2 C.A. 1958).
> *Stein* v. *U. S. Lines* (S.D.N.Y.), 132 F. Supp. 334, 1955 A.M.C. 722.

This burden of the carrier to explain the cause of damage and its non-liability is an "extraordinary" duty arising from the relation of a common carrier to an owner of the goods entrusted to the charge of the former.

> *American Trading Co.* v. *The Harry F. Culbreath*, 187 F. (2) 310 (2nd Cir., 1951).

This is akin to the age old rule of placing upon the bailee, in the event of loss or damage to the goods entrusted to him at a profit to himself, the burden of proving what caused the loss or damage and that that was one which exculpated him.

> *Alliance Assurance Co.* v. *U.S.A.*, 252 F. (2) 529 (2 C.A. 1957).

Has Cogsa changed this burden of proof? If so, to what extent? Generally, the act has codified insofar as it goes, the law existing at the time. So say Gilmore & Black at the pages set forth *supra*. The authors seem to argue this point persuasively enough. In section 1303 of the act the responsibilities and liabilities of the carrier

and ship are set forth, apparently as conditions, which, if they comply therewith will entitle them to the immunities that follow in the next section. Hence, we find that a carrier must exercise due diligence in the respects mentioned, to issue bills of lading under the stipulated conditions and among its responsibilities, we find that as to cargo "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried". The elements of a *prima facie* presumption by the state of the cargo at outturn is spoken of in subdivision 6. It is provided that a *prima facie* good delivery is made out by a carrier if the receiver fails to note in writing "The general nature of such loss or damage" at time of delivery. It further provides that such notice may be endorsed upon the receipt for the goods. Here, there were exceptions taken to the delivery of the goods upon the receipt given for the goods, first by the stevedores before discharging the cargo (libellant's exhibit 10) which states "11 bundles recoopered, 56 bundles straps and skids broken" and then by the Erie Railroad lighterman who noted in the delivery book "11 bundles recoopered; 36 bundles straps and skids broken". Here, then, there was a compliance with the statute's requirement to defeat a *prima-facie* presumption of good delivery by the carrier by the noting of exceptions to the condition of the goods at delivery.

What effect would the taking of these exceptions have upon the burden of proof? There are no cases either in this Honorable Court or in the courts below interpreting the statute and what legal effect would follow upon compliance therewith by the receiver of the cargo. Several cases have held that damage is inferrable from the nature of the exceptions taken.

Folger v. *United Fruit Co.* (5 C. A.), 170 F. Supp. 933, rev. other grounds 270 F. (2) 666, cert. den. 362 U. S. 911;
Stein v. *United States Lines*, *supra*.

In *Folger*, the commodity was coffee in bags and the exceptions were in part "Some of the bags were wetted and visibly stained". The court said that there the burden of showing an excuse was thrown upon the carrier. In *Stein*, the commodity was wool tops in paper and burlap and the exceptions were "wrappers more or less torn". The court held that that was sufficient evidence of damage to pass the burden of explanation upon the carrier. Also, in *F. Badriena E. Hijo, Inc.* v. *The Rio Iqauzo*, 182 F. Supp. 885 (E. D. La. 1960), this question is touched upon. The commodity was jerked beef. It was carried to two ports by different ships under two separate bills of lading. No exceptions were filed at the delivery by the first carrier. The exception filed at the second port was "1 bale T/R Gross Wgt 22#". The damage complained of was inherent damage, a sourness of the beef. The court had nothing to say about the legal effect of the one exception taken but apparently it was not convinced that a good order delivery to the carrier had been made out anyway and it dismissed the libel.

In neither of these cases was the legal effect of the filing of written exceptions to the condition of the cargo at outturn discussed or decided. In the first two cases, the courts held that the exceptions were evidence of damage apparently relying upon the inherent nature of the exceptions themselves. The act, however, talks of the burden of proof. It places the burden of proof of damage upon the cargo owner unless exceptions are taken and noted. Doesn't it then follow that where exceptions are taken and noted that the burden of proof of damage has been met by the cargo and the burden of explanation passes unto the carrier by the mere act of the cargo filing such written exceptions. Wouldn't it follow in this case, that the carrier must show that despite the recoopering of 11 bundles and the breaking of straps and skids on 56 other bundles, no damage had occurred. It must be observed that the recoopering and the breaking of bundles would cause the damage complained of and under the principles

of the *Armco* and *Empresa* cases, *supra*, and the *Vallescura* case, *supra*, the carrier is to be held liable for such damage, unless it can separate that for which it is not liable—from that for which it is liable.

Isn't the mere act of filing exceptions to the state of the cargo at delivery by the carrier, proof of damage according to this provision of Cogsa. It must be so. It is to be found under the general heading of the rights and liabilities of the carrier. It speaks of granting the carrier a right it normally did not have before the act, a presumption of good delivery according to the bill of lading if no exceptions are filed. If they are filed, is the presumption rebutted? If it is, then are the exceptions themselves by operation of the statute proof of damage sufficient to throw the burden of explanation upon the carrier. It is submitted that that is the intent of the framers of the act, a necessary concomittant to the new right established in favor of the carrier.

Could, nevertheless, the courts below disregard these exceptions, the trial court on the ground of "credibility", the appeal court on the ground that the trial court was the sole judge of "credibility". Hardly, neither judicial officer would have the power to overrule the statute, but in this case, neither court even considered the argument, though it was made at every turn. This failure of the courts below to apply the law is an error which deserves the attention of this court. This element of the burden of proof touches upon every shipment entering or leaving the ports of our country. If it was important to the shipping industry to have the legal effect of the "Both to Blame" clause in a bill of lading considered by this honorable court as was done in *U. S.* v. *Atlantic Mutual Ins. Co.*, *supra*, then this case which presents a case of far wider consequences to shipping interests should be considered. A moment's reflection will prove this point. The "Both to Blame" clause had application only in the event of a collision. While no statistics are available to

compare the number of collisions to the number of ships sailing safely and collision-free, or to the number of shipments aboard collision-free voyages, the plain sense of the situation proves the obvious. Every shipment on every vessel, in or out-bound, and every cargo owner of every such shipment and their insurance counterparts are involved in this provision of Cogsa as compared to the relatively few cases of shipment aboard ships in collision. This court will truly render a great public service to advert to this, so far, never adverted to provision of the law, and to clarify the meaning of the statute apropos the right of cargo to a presumption of damage when exceptions to the state of the cargo are filed in writing at outturn. If this court finds that the filing of exceptions, as in this case filed, creates a presumption of damage and places upon the carrier the burden of explanation, then it must find that the courts below erred in disregarding the exceptions here.

Wherefore, it is respectfully submitted that a Federal question exists which has not been decided by this court but which ought to be and that the Court of Appeals has so far departed from legal standards of judicial conduct or has sanctioned the same so as to call for the exercise of the supervisory powers of this court either of which matters presents a case for the consideration of this court. Consequently this court is respectfully asked to issue its writ of certiorari to the United States Court of Appeals, Second Circuit to review the final judgment in this case.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney for Petitioner.

APPENDIX

i. Decisions Below

1. First Decision of Trial Court

(591) The Court: Here is my decision:

I find that there is no credible evidence that the steel that is involved in this case was discharged from the ship either crimped, wet, rusty or in otherwise damaged condition. The only evidence of such damage is the testimony of Krasnov and I do not believe any of Krasnov's testimony.

I find that there is no competent evidence in the case that the libelant is the owner of the claim which it prosecutes.

I find further that this action was started in October, 1954, and there was no notice of plaintiff's claim given as required by the Statute, 46 U.S.C.A. 1303.

* * * *

First Decision of Court of Appeals.

* * * * * * *

(2082) CLARK, *Circuit Judge*:

Libelant, M. W. Zack Metal Company, appeals from a decree for respondent in an action brought in admiralty to recover for damage to 77 bundles of steel purchased by libelant and shipped to the United States on respondent's SS Birmingham City. After respondent's ship docked in Hoboken, New Jersey, the steel was unloaded by impleaded respondent, Jarka Corporation, a stevedoring company. It was then lightered to Weehawken, and there loaded into three open railroad gondolas for delivery to libelant in Detroit. When the shipment arrived in Detroit, libelant's employees found it to be rusted and otherwise damaged; and libelant thereupon instituted the present action. Judge Clancy dismissed the libel after trial saying:

(2083) "I find that there is no credible evidence that the steel that is involved in this case was discharged from the ship either crimped, wet, rusty or in otherwise damaged condition. The only evidence of such damage is the testimony of Krasnov and I do not believe any of Krasnov's testimony.

"I find that there is no competent evidence in the case that the libelant is the owner of the claim which it prosecutes.

"I find further that this action was started in October, 1954, and there was no notice of plaintiff's claim given as required by the Statute, 46 U. S. C. A. 1303.

"On all these grounds, I dismiss the libel."

Libelant's ownership of the claim. Despite libelant's failure to show in full detail the chain of title leading to its acquisition of the steel, we think there can be no doubt of its right to maintain the present action. The steel in

question was shipped under a bill of lading dated April 24, 1953, issued by respondent at the port of Avonmouth, England, and containing the notation, "Notify Merit Import & Export Corp'n, 82 Wall Street, New York, and Schwabach & Co., 60 Beaver Street, New York." By confirmation order dated April 23, 1953, the steel to be thus shipped was sold by Framen Steel Supply Company, Inc., to the libelant. When the shipment arrived in Hoboken, the arrangements for its eventual transportation to Detroit were carried out according to instructions given by the libelant. At no time did any of the parties in the somewhat disconnected chain of title challenge the fact that libelant was the beneficial owner of the steel. Indeed, when its right to maintain this action was questioned, libelant obtained from Framen Steel Supply Company, Inc., and from Schwabach & Co., assignments of any claim they might (2084) have against respondents for damage to the steel in question. In view of these facts we think that, irrespective of niceties of "title," libelant was clearly the beneficial owner of the steel shipped on respondent's vessel, and as such was entitled in its own right to maintain this action for damages. F. R. 17(a). We are able to reach this result without reliance on the fact that it received assignments from two of its mesne suppliers after the statute of limitations had run; although that statute would not have been a bar even if the action depended on the assignments, since it was timely commenced and its amendment to allege the assignments would not constitute a new claim for purposes of the statute of limitations. F. R. 15(a).

Libelant's proof as to its claim. Since libelant failed to give notice of the loss or damage within three days of delivery to its bailee, it had the burden of rebutting the prima facie defense of delivery in good condition raised by the Carriage of Goods by Sea Act, 46 U. S. C. § 1303 (6). *Miami Structural Iron Corp.* v. *Cie National Belge de*

T. M., 5 Cir., 224 F. 2d 566; see Poor, Charter Parties and Ocean Bills of Lading 159-60 (4th Ed. 1954). The district court found that the only evidence showing delivery in bad condition was the testimony of libelant's former employee, Krasnov, whom the court found unworthy of belief. There were various inconsistencies in Krasnov's story, and the trial court's judgment as to the credibility of this important witness cannot be disturbed.

So far as rust is concerned—and that is the principal damage complained of—the only other direct evidence that the steel was discharged in rusted condition was given by the deposition of George Jeremy, terminal superintendent for the stevedoring company at the time of unloading. Jeremy stated that he saw an undetermined quantity of steel in rusted condition on the pier after it was discharged. (2085) It is not entirely clear, however, whether the rust observed was of the steel sheets themselves, or only of the outer wrapping sheet, which can ordinarily be expected to rust. Furthermore, Jeremy was unable to identify the rusted steel as belonging to the shipment in question, rather than to some other companion shipment. There is circumstantial evidence suggesting that rust may have occurred during the ocean voyage, since the weather was rough, water flowed over the deck, and some of the steel bundles became undone. On the other hand, the witnesses to the undoing of the steel bundles failed to testify as to any water or moisture attacking those bundles. In view of this record, if libelant's claim depended on showing that the steel had already become rusty when discharged from the ship, a district court would be justified in finding that it had not sustained its burden of proof.

We do not think, however, that libelant's claim necessarily depends on producing direct testimony that the steel sheets had become rusted at the time of discharge. First of all, rust was not the only item of damage sued for; libelant also claimed bending and tearing. In addition, the

evidence raises the possibility that, if the steel was not rusted at the time of discharge, any subsequent rusting was caused by the conduct of the respondent or the stevedoring company. Libelant introduced ample evidence that some of the steel bundles had become undone in the course of the voyage and the unloading. Perhaps this condition permitted an exposure to moisture which resulted in the development of rust during the period after discharge from the ship. Furthermore, two of libelant's witnesses testified that the rail shipment in open cars from New York to Detroit would not ordinarily produce rust unless the packaging was deficient in some respect. If the unsatisfactory condition of the bundles was not remedied before (2086) respondent delivered the steel for shipment to Detroit, respondent might be chargeable with responsibility for rust developing as a result of the defective packaging. None of these problems is met by the district court's terse statement dismissing the libel.

Resolution of these problems is not the province of an appellate tribunal, but of the trial court. E.g. *Kelley* v. *Everglades Drainage Dist.*, 319 U. S. 415, 421-422; *Barnard-Curtiss Co.* v. *United States for Use and Benefit of D. W. Falls Const. Co.*, 10 Cir., 244 F. 2d 565, 567. Libelant's case was sufficiently substantial to require detailed findings of fact, and it was error to dispose of the case summarily on the brief oral statement quoted above. See Admiralty Rule 46½; *Panama Mail S. S. Co.* v. *Vargas*, 281 U. S. 670; *Victory Towing Co.* v. *Bordelon*, 5 Cir., 219 F. 2d 540. Accordingly, the decree below is vacated and the case is remanded for reconsideration, in the light of additional evidence if necessary, of such questions as (1) the extent to which the bundles were broken in the course of the ocean voyage; (2) the extent to which the bundles were broken in the course of unloading; (3) whether adequate steps were taken to remedy the unsatisfactory condition of the

bundles; (4) whether the unsatisfactory condition of the bundles was a proximate cause of rust occurring subsequent to discharge from the ship; (5) whether the unsatisfactory condition of the bundles was due to the fault of respondent or of the impleaded respondent or to some other cause; (6) whether respondent is responsible for any damage other than rust which might have existed at the time of discharge. Specific findings of fact and conclusions of law should be made as to all points of substance raised by the evidence.

Alleged pre-trial or trial errors. We do not find any errors to have occurred in the course of the trial. There (2087) was no abuse of discretion in denying a continuance sought by libelant to enable it to locate Captain Harris and produce him as a witness. According to the affidavit of libelant's proctor, Harris "works for Erie Railroad Co. and apparently received the steel from respondents and knew the condition of the steel at that time." Libelant has not shown that Harris would give any testimony favorable to it, however, or that it made reasonable efforts to assure his attendance at trial. See *Ockert* v. *Union Barge Line Corp.*, 3 Cir., 190 F. 2d 303; *Wilson* v. *Beckett*, D. C. Cir., 143 F. 2d 19. Neither was there any abuse of discretion in limiting the cross-examination of Captain Yates. The deposition of Lunenburg, an employee of Jarka Corporation, was properly excluded, since he was available at trial; but libelant declined to call him as a witness. His deposition described the inspection procedure of Jarka in connection with the shipment in question, and could not be considered a declaration by Lunenburg against his interest.

We affirm the order of Judge Sugarman awarding respondent $100 attorney's fees under Admiralty Rule 32C for libelant's unjustified refusal to answer the first interrogatory.

The decree of the district court dismissing the libel is vacated, and the action is remanded for the making of specific findings of fact and conclusions of law and the then entry of an appropriate decree.

(2175)

Decision of Clancy, J., After Remand.

FINDINGS OF FACT

1. Libellant sues to recover alleged damage to a quantity of steel sheets carried by the S.S. BIRMINGHAM CITY, owned by the respondent, Bristol City Line of Steamships, Ltd. from Avonmouth to Hoboken. The respondent shipowner impleaded the respondent, Jarka Corporation, a stevedoring concern, which it had employed to discharge the BIRMINGHAM CITY's cargo.

2. The steel was delivered to the ship at Avonmouth on or about April 24, 1953. The shipment of which the allegedly damaged steel was a portion was a lot of 127 bundles of steel sheets marked M1E D. There was a further and larger shipment carried on the BIRMINGHAM CITY in other holds. The ship arrived at Hoboken the 5th day of May, 1953, where the cargo of steel sheets was discharged.

3. Each bundle marked M1E-D weighed about two tons and consisted of oiled steel sheets enclosed in waterproof paper, which was in turn enveloped in metal waster-sheets consisting of trumpeting around the edges plus a top and bottom waster sheet. Each such package was then secured with three metal cross straps, thereby making a firmly secured package. The strapped package was then placed on two wooden skids and attached thereto by two

length-wise straps running completely around both the envelope and the skids. The waster sheets were unpainted except for an area on top of each bundle where the markings MIE/D in white plaint were superimposed on a black background.

(2176) 4. Other bundles of steel sheet bearing other and different marks and numbers were packaged in somewhat similar fashion, except that these other shipments did not have the additional cross-strapping independent of the skids. The importance of this difference in packing was that if a skid or skid strap broke on an MIE/D bundle, the package would still remain firm and tightly strapped; the breaking of a skid on the other type would immediately loosen the bundle.

5. The purpose of the external waster sheets is to protect the steel sheets from the effects of normal handling and anticipated atmospheric rust. The usual appearance of such bundles after ocean transportation is for the waster sheets to be rusted and/or crimped and/or dented; the external appearance is not indicative of the condition of the contents.

6. The bundles in the MIE/D shipment were packaged at a steel mill in Ebbw Vale, England, some time in April 1953, and at that time the inner steel sheets were free from rust or other damage. Libellant presented no evidence to show what happened while the bundles were in transit from the mill at Ebbw Vale to the dock at Avonmouth, nor any evidence to show how long they were in transit.

7. Bundles of steel sheet were distributed in the tween deck spaces as follows:

(2177) No. 1 - 101 bundles Other marks

No. 2	116 bundles	Other marks
No. 4	30 bundles	MIE/D
	34 bundles	Other marks.
No. 5	97 bundles	MIE/D

8. The cargo holds of the S.S. BIRMINGHAM CITY, including No. 4 and No. 5 tween deck, were clean and dry prior to loading and throughout the entire voyage. The bundles were stowed on dunnage, across most of the tween deck space, and wooden chocks were inserted between the bundles to prevent lateral movement. No water entered the tween decks or other cargo holds during the voyage, and the cargo spaces were properly ventilated, but the waster sheets accumulated a coating of normal atmospheric rust during the ocean voyage.

9. The bundles in No. 5 tween deck were overstowed with unboxed automobiles, each of which rested on a wooden platform. During the voyage, two of these automobile platforms broke loose and slightly shifted. The platforms had been secured in such manner that even if two platforms became loose the remainder of the car platforms would still remain in place. The two loose car platforms caused straps or skids to break on no more than six bundles directly beneath the automobiles. However, because of the above described method of strapping, the affected bundles did not open or become loose.

(2178) 10. Upon inspecting the hatches of respondent's vessel, it was observed by the employees of respondent-impleaded that difficulties would be encountered in the discharge of the cargo by reason of some of the cargo having come adrift. Prior to the commencement of the discharge operations the respondent-impleaded refused to discharge

the cargo until a survey was held to ascertain what, if any, damage existed, and to observe the safe manner of discharge of the cargo by the employees of respondent-impleaded. During the discharge extra supervision was used in the holds and on the dock. Wire slings for hoisting were wrapped for protection with wire hose. Rollers, dollies and fork lifts were used in the holds to facilitate careful discharge. The primary difficulties encountered existed in hatch #2 of respondent's vessel and little difficulty was encountered in hatches #4 and #5.

11. There was no rain at Hoboken during discharge of any of the cargo, the hatches were properly covered at all other times, and the cargo was stored on a dry covered pier until delivery to the Erie Railroad. The MIE D bundles in No. 4 and 5 tween deck were properly loaded, stowed, carried, cared for and discharged.

12. After delivery of the bundles in suit on to the Erie Railroad lighters at Hoboken, the lighters were towed to Weehawken, and the bundles there discharged and then loaded into three open railroad gondolas and shipped to Detroit.

(2179) 13. Libellant failed to show what happened to the bundles or what care was given to them during transit to Weehawken on the evening of May 11 to the morning of May 13, and to account for an increase in the exceptions taken there over those taken at Hoboken from six bundles with skids and bands broken to 29 bundles with skids broken.

14. The 77 bundles as to which damage is claimed herein comprised the full loading of three open railroad gondolas which had no covering or other protection from rain or the elements while en route to Detroit.

15. Upon arrival at Detroit, the waster sheets on the 77 bundles were removed to conceal the fact that the steel was not a domestic product. At that time, the individual sheets were found to be wet and wiped dry, and they were starting to rust at the edges; they were re-strapped into six-ton bundles but without any protective or waster sheets, and they were shipped to a prospective purchaser. Thereafter these same steel sheets were rejected by the prospective purchaser because of heavy rust damage, and were returned to Detroit.

16. Libellant's first written notice of claim was addressed to Framen Steel Supply Company on June 12, 1953, after the aforesaid rejection at which time libellant claimed that after checking each bundle, 85% of the steel was found to be either water marked (2180) or badly rusted, but no mention was made that the steel was crimped or otherwise damaged. Libellant's first written notice of claim to respondent was submitted on November 2, 1953.

17. There is no acceptable evidence that the steel sheets inside any of the bundles were rusted or damaged at the time when they were discharged and delivered to the consignees at Hoboken. There is no proof as to how the steel sheets were cared for between Ebbw Vale and Avonmouth, or between Hoboken and Weehawken, or between Weehawken and Detroit, at which latter city damage was first discovered. Even if there had been condensation of moisture in the ship's holds, it would have settled on the outside water sheets and would not have rusted the protected inner sheets.

18. The relatively uniform rusting to the contents of all 77 bundles as first found at Detroit is consistent with the fact that these bundles constituted one lot shipped from

Weehawken to Detroit in open gondolas; it is inconsistent with various allegations of damage to lesser numbers of bundles bearing the same mark.

19. Some bundles of steel sheet bearing other marks, and especially those stowed in No. 2 tween deck, and without the separate cross-strapping, broke open during discharge, and such bundles were re-strapped before delivery.

20. The packaging of all bundles of steel sheet shipped on the subject voyage was insufficient because the soft wood skids and the metal straps were not strong enough to protect a two ton (2181) bundle from the rigors of normal handling. Since 1953 the packaging of similar steel bundles has been improved by using hard wood skids that do not easily splinter and break, and stronger steel straps.

21. The broken straps or skids on the six MIE/D bundles were not a cause of damage because they did not disturb the integrity of these bundles.

22. The libel was filed in October 1954, and libellant alleged that the shipment in suit was discharged from the vessel in an injured and damaged condition due to water contact, contact with ship's sides, appurtenances, equipment and other things aboard the vessel, and in other respects unknown to libellant. There is no credible evidence that the steel that is involved in this case was discharged from the ship either crimped, wet, rusty or in otherwise damaged condition.

Conclusions of Law

1. This Court has admiralty jurisdiction of the parties *in personam* and of the S.S. Birmingham City *in rem*, and of the subject matter of this action.

2. There was no damage sustained to the cargo in suit while it was in the custody of the S.S. BIRMINGHAM CITY, or of either of the respondents, and consequently respondents and the vessels are not liable herein.

(2182) 3. Respondents and the vessel did not cause or contribute to any damage which may have occurred after the goods left their custody and control.

4. The libel is dismissed with costs as taxed to respondent and the impleading complaint of respondent is dismissed with costs as taxed to respondent-impleaded.

JOHN W. CLANCY,
United States District Judge.

January 22nd, 1962.

Second Decision of the Court of Appeals

MEDINA, *Circuit Judge:*

M. W. Zack Metal Company appeals from a final decree in admiralty dismissing its libel to recover for cargo damage against the S.S. Birmingham City and her owner, Bristol City Line of Steamships, Ltd. The stevedore Jarka Corporation was impleaded, but we will give no separate consideration to the cross-claim against Jarka as we have decided to affirm the decree.

There have been two trials. We reversed the first decree against Zack because the findings were too fragmentary and inadequate to cover all points of substance raised by the evidence. *M. W. Zack Metal Company* v. *The S.S. Birmingham City*, 2 Cir., 1961, 291 F. 2d 451. We also reversed the rulings favorable to the vessel and her owner that the cargo owner's proof of ownership of the goods

was not satisfactory and that the claim was time barred for failure of Zack to give the notice required by 46 U. S. C. Section 1303(6). On the new trial Zack produced further proof and, after due consideration, new and detailed findings were made and the libel was again dismissed on the merits. The findings and conclusions of Judge Clancy are reported at 1962 Am. Mar. Cas. 925.

Zack's claim is for damage to 77 bundles of steel shipped on the Birmingham City at the port of Avonmouth, England. The vessel docked at Hoboken, New Jersey, where the steel was unloaded, lightered to Weehawken and there loaded into railroad gondolas and transported to Detroit, Michigan, where some of the steel was found to be rusted and otherwise damaged. The specific 77 bundles with respect to which damage is claimed were ultimately rejected by a purchaser.

After the style of the great epic poems of the ancient Greeks and Romans, the briefs on both sides plunge immediately *in medias res*, and then proliferate in all directions, without even the semblance of an attempt to treat the sequence of events, and the proofs relating to them in a chronological or any other rational manner. It seems to be assumed that we know all about the case, and counsel have belabored one another with charges and countercharges that serve only as far-from-diverting digressions and result in a general mass of confusion. Zack in effect tells us the critical findings are clearly erroneous, and that the trial judge not only misapplied the law applicable to this rather common type of case, but that he also failed to make the very findings directed to be made by the prior opinion of reversal.

Under these circumstances we have felt the ends of justice required a careful scrutiny of the entire trial transcript and the exhibits. As a result of this we are convinced the trial judge did precisely what it was contemplated he should do and, with one exception that does not

affect the outcome, to be discussed in due course, we hold the findings are decisive of the issues and are supported by substantial evidence. We affirm the decree dismissing the libel.

Zack's claim is for damage to 77 bundles of steel sheets marked "MIE/D". These 77 bundles were: shipped from a plant at Ebbw Vale, England, on April 16, 1953; loaded aboard the Birmingham City by the employees of the shipowner at Avonmouth, England, on April 21-4; transported to Hoboken, New Jersey, where they arrived on May 5; unloaded by Jarka's longshoremen on May 5 and 6; loaded on May 8 and 11 aboard a lighter of the Erie R. R. Co. by employees of the railroad; taken to Weehawken, New Jersey, where, on May 12 and 13, they were placed in three Erie freight gondolas and conveyed by rail to Detroit, Michigan, where they arrived at some time between May 18 and May 25, 1953.

These 77 bundles were part of a lot of 127 bundles of similar "MIE/D" steel sheets and 137 other bundles of steel sheets marked "MPD/D". Each of the "MIE/D" bundles weighed about two tons and consisted of oiled steel sheets enclosed in protective waterproof paper, and given added protection by being enveloped in metal waster sheets, consisting of trumpeting around the edges and a top and bottom waster sheet. Each such package was then secured by three metal cross straps and the package thus strapped was placed on two wooden skids to which it was attached by lengthwise metal straps running completely around both the package and the skids. Thus the combination of skids and package with the two sets of metal straps, one crosswise around the package of doubly protected oil steel strips, and another lengthwise and around both the package and the skids, became what is called in this record a "bundle" of "MIE/D" steel. The marking "MIE/D" was superimposed in white paint against a black background on the top waster sheets; and was plainly visible.

The "MPD/D" bundles in the same shipment were made up in a similar manner but with one most significant difference. The "MPD/D" bundles had no separate metal cross-strapping around the package. From the above it may be deduced, and the facts are clearly established in the record, that rust could only be formed on the oiled steel strips if both the waster sheets and the waterproof coverings were torn or broken, so that humidity in the atmosphere, rain, sea water, ship or cargo sweat, or other moisture could reach the inner strips of steel. It is also apparent that once moisture had penetrated apertures both in the torn waterproof envelopes and broken waster sheets, any subsequent recovering and rebanding alone could scarcely be expected to stop the progress of the rust. Implicit also in this basic factual background, including a whole series of loading and unloading operations, is the likelihood that witnesses were confused by the similarity of the "MPD/D" bundles, in which we are not interested except tangentially, and the "MIE/D" bundles, damage to which presents the sole issue to be decided. Also, it should not surprise us to find some of the entries or statements, in the multiplicity of documents in evidence, inconsistent, confusing and unreliable. Most of the testimony was by deposition, but several of the principal witnesses gave their versions of what they saw at various times and places in plain view of the trial judge in open court.

Accordingly, unless we find some misapplication of the rules of law governing cargo damage cases, our inquiry is likely to be focused upon the trial judge's findings. As these seem on their face to be dispositive of the issues, and as we shall find that so they are, we can readily understand why it is that counsel for Zack has tried so hard to persuade us that this Court, on the prior appeal, gave positive instructions that there be detailed findings with respect to particular factual matters not necessarily required by the rules of law applicable to these cargo damage cases. Here

again, but only after a prolonged winnowing process, we find that no such directions were or could have been intended, and that the findings were adequate for all purposes relevant to the decision of the case, bearing in mind that issues of credibility, and those arising out of contradictory testimony, other inconsistencies and the general welter of exaggeration, hesitancy and half-truths, even in cases where the testimony is partly or even wholly by deposition, are primarily to be disposed of by the trial judge in a non-jury case, and not by an appellate court.

We turn to the applicable law. Under the Carriage of Goods by Sea Act, 46 U. S. C. Sections 1303, 1304, the cargo owner bears the burden of proving delivery of the goods in good condition and outturn by the vessel, or by the stevedore for whose conduct the vessel was responsible, in damaged condition. The burden then shifts to the vessel to prove the damage occurred through a cause excepted under the Act or the exercise of due diligence to prevent the harm. *Miami Structural Iron Corp.* v. *Cie Nationale Belge De T. M.*, 5 Cir., 1955, 224 F. 2d 566, 568; *United States Smelting, Refining & Mining Co.* v. *Waterman S. S. Corp.*, E. D. La., 1945, 62 F. Supp. 511, 518, affirmed, 5 Cir., 1946, 155 F. 2d 687, cert. denied, 1946, 329 U. S. 761; *F. Bairena E. Hijo, Inc.* v. *The Rio Iguazu*, E. D. La., 1960, 182 F. Supp. 885, 891-2; *Schroeder Bros., Inc.* v. *The Saturnia*, S. D. N. Y., 1954, 123 F. Supp. 282, 284, affirmed, 2 Cir., 1955, 226 F. 2d 147. As stated in our prior opinion in this case, "damaged outturn" could be established not only by proof that upon discharge of the cargo on the pier at Hoboken the inner sheets were already rusted or otherwise damaged, but might also be established by proof that the rust or other damage that may have developed after such discharge was caused by the vessel or by those for whose conduct the vessel was responsible. 291 F. 2d at page 454. See also *Armco International Corp.* v. *Rederi A/B Disa*, 2

Cir., 1945, 151 F. 2d 5, 8. Moreover, if the cargo owner proved good delivery and bad outturn as to any portion of the specific 77 bundles for damage to which recovery is sought, the shipowner would then have to establish by proof what portion of the balance of the shipment was either delivered in bad condition or was outturned in good condition. *Armco International Corp.* v. *Bolero A/B Disa, supra; Empresa Central Mercantil De Representacoes, LTDA.* v. *Republic of U. S. of Brazil*, S. D. N. Y., 1957, 147 F. Supp. 778, 781, affirmed, 2 Cir., 1958, 257 F. 2d 747.

To avoid any possible misunderstanding a few additional preliminary observations seem desirable and proper. Zack seems to have the impression that we held on the prior appeal that it had on the first trial made out a *prima facie* case and thus shifted the burden. We did no such thing. We merely held that detailed findings should be made "as to all points of substance raised by the evidence." 291 F. 2d at page 455. Another misconception that goes to the heart of Zack's argument on this appeal, is that the purport of our decision on the prior appeal is to require the trial judge to make an affirmative finding with respect to the actual cause of the damage. No such inference may fairly be drawn from the text of the opinion; and such a requirement would fly in the face of the well settled principles of law we have just briefly set forth. If the cargo owner fails to sustain its burden, its libel must be dismissed, even if the cause of the damage found at the point of ultimate destination may still remain *in nubibus*. Zack also complains because the findings and conclusions do not correspond exactly with those sketched by way of illustration in the earlier opinion. It is a sufficient answer, we think, to say that the findings and conclusions now before us are adequate to dispose of all relevant issues and that there is substantial evidence to support them.

Moreover, the scope of our powers of review are not unlimited. While this is a case in admiralty, the "clearly erroneous" principle embodied in Federal Rule of Civil Procedure 52(a) is applicable. *McAllister* v. *United States*, 1954, 348 U. S. 19, 20. A fair statement of the rule is that we may not set aside a finding of fact unless we are left with the "definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 1948, 333 U. S. 364, 395, and that we will reverse "most reluctantly and only when well persuaded." *United States* v. *Aluminum Co. of America*, 2 Cir., 1945, 148 F. 2d 416, 433. We must respect the evaluation of credibility made by the trial judge of the witnesses present before him, *Broadcast Music, Inc.* v. *Havana Madrid Restaurant Corp.*, 2 Cir., 1949, 175 F. 2d 77, 80. As we have already held on the previous appeal in this case, we cannot disturb Judge Clancy's refusal to believe Zack's principal witness Krasnow. 291 F. 2d at page 454. When we have thus given due weight to what may be deemed the effect of the demeanor of a witness upon the trial judge, we are probably not at much of a disadvantage *vis-a-vis* the trial judge insofar as concerns documentary proof and testimony read from depositions. *Iravani Mottaghi* v. *Barker Importing Co.*, 2 Cir., 1957, 244 F. 2d 238, 248, cert. denied, 354 U. S. 939; 5 Moore, *Federal Practice, Section* 52.03[1], pp. 2615-16 (2d ed. 1951). What this comes down to in substance is that we must take a good, hard look at the record as a whole, and when all is said and done, given the unavoidable division of function between a trial and an appellate court, we should only reverse when fairly well persuaded. See *Austin* v. *Commissioner*, 2 Cir., 1962, 298 F. 2d 583, 584-5; 2B Barron & Holtzoff, *Federal Practice & Procedure*, Section 1132, pp. 523-4 (2d ed. 1961).

We shall now examine the proofs and the findings in sufficient detail to determine whether or not each of them

should stand or be set aside as clearly erroneous, and whether or not they are decisive of the case in view of the applicable principles of law above outlined.

I

THERE WAS GOOD DELIVERY AT AVONMOUTH

Judge Clancy seems to have reached the conclusion that the proof of good condition on delivery to the vessel at Avonmouth was defective because the record was bare of "proof as to how the steel sheets were cared for between Ebbw Vale and Avonmouth." This was error. We find ample *prima facie* evidence of good delivery, which the shipowner has not rebutted.

Quite true, there is no direct evidence of what happened to the shipment on the 45-mile truck journey from Ebbw Vale to Avonmouth from April 16 to April 21. But a clean bill of lading was issued, Libellant's Exhibit 1, dated April 24, 1953, and this is sufficient. Carriage of Goods by Sea Act, 46 U. S. C. Section 1303(4). Nor is it of any avail to the shipowner to assert that the inner sheets were not visible on delivery at Avonmouth and consequently damage notations impossible. *Copo Steel & Engineering Co.* v. *S. S. Alcaki*, S. D. N. Y., 1955, 131 F. Supp. 332, 333; *F. Badrena E. Hijo, Inc.* v. *The Rio Iguazu, supra*, at 891. The answer is that it is conceded that the inner sheets were in good condition at Ebbw Vale with the packing intact. Moisture could have reached these sheets on the trip from Ebbw Vale to Avonmouth only if the paper and the waster wrappers were torn or broken, and the bill of lading makes no mention of any such damage.

Taking into consideration the notation of drifting damage on the receipt given to the trucker's, Libellant's Exhibit 4, and in the Cargo Superintendent's report, Libellant's Exhibit 3, as well as the testimony of Martin, a dock

foreman employed by the independent cargo superintendent, and Irish, the first mate of the Birmingham City to the effect that he saw some bundles with broken straps and skids, but no open bundles, we think the cargo owner proved good delivery.

As evidence of broken straps and skids is found in the record, not only with reference to the period just prior to delivery at Avonmouth, but also with reference to the condition of the bundles at outturn in Hoboken, we might as well dispose of the subject now. There is proof that the lumber used for the skids was "very frail" and not strong enough to bear such large and heavy packages of steel strips. Thus there was occasion for a certain amount of extra handling and recoopering. This is the precise point at which we may discern the significance of the different methods of securing the "MIE/D" and the "MPD/D" bundles. Judge Clancy properly found that the breaking of a skid or skid strap (lengthwise) on a "MIE/D" bundle would not loosen the bundle as the cross-strapping would keep the package "firm and tightly strapped." The critical finding is, "because of the above described method of strapping, the affected bundles did not open or become loose. We hold this applies as well to the delivery at Avonmouth as it does to the outturn in Hoboken.

There is no way to resolve the dispute between these parties as to the extent of the damage, if any, to the "MPD/D" bundles not involved in this litigation. There is confusion between the "MIE/D" and the "MPD/D" lots in the testimony of many of the witnesses, all of which makes the resolution of the issues of fact peculiarly the function of the trial judge, who observed the demeanor of several of the witnesses and, in his comments during the trial as well as in his findings and conclusions, demonstrated a close familiarity with the proofs, testimonial and documentary.

In this state of the record it is idle for counsel for Zack to repeat *ad nauseam* references to the defective lumber, broken skids, recoopering and restrapping. And the same observation applies to rust on the waster sheets. These were attached for protection against moisture in any form and were commonly found in a rusted condition. This was "normal" and in no way indicated that any moisture had reached the oiled steel strips, covered not only by the waster sheets but by the protective paper envelope as well.

II

DESPITE THE ROUGH VOYAGE THERE IS AMPLE EVIDENCE TO SUSTAIN THE FINDING THAT THE STEEL STRIPS WERE FREE FROM DAMAGE OF ANY KIND AT OUTTURN.

The finding that goes to the heart of the case is:

> "22. The libel was filed in October 1954, and libellant alleged that the shipment in suit was discharged from the vessel in an injured and damaged condition due to water contact, contact with ship's sides, appurtenances, equipment and other things aboard the vessel, and in other respects unknown to libellant. There is no credible evidence that the steel that is involved in this case was discharged from the ship either crimped, wet, rusty or in otherwise damaged condition."

The "MIE/D" steel was stowed in No. 4 and No. 5 'tween decks. The "MPD/D" steel was stowed principally in No. 1 and No. 2, but also to some extent in No. 4 'tween decks. We shall not pause to describe the details of the stowage. Suffice it to say, the passage was rough, seas broke over the vessel's decks, but the evidence sup-

ports the findings that the 'tween decks "were clean and dry prior to loading and throughout the entire voyage," that "no water entered the 'tween decks or other cargo holds," which "were properly ventilated," and that the "waster sheets accumulated a coating of normal atmospheric rust during the ocean voyage."

The only incident of any significance that occurred at sea was the shifting of the platforms on which were placed unboxed automobiles. The bundles of "MIE/D" steel in No. 5 'tween deck was overstowed with these unboxed automobiles on wooden platforms. The shifting of these two platforms caused the breaking of the skids or straps "on no more than six bundles" of steel "directly beneath the automobiles." The finding is that because of the method of strapping to which reference has already been made, "the affected bundles did not open or become loose."

We have read the testimony of Captain Ramsay, First Mate Irish, the stevedore supervisors Yates and Jeremy, the shipowner's pier superintendent Anderson, as well as that of Zack's consulting engineer Tour and other experts Warner and Cohen, the supervisor Jaskowiak of the Detroit public storer, and of Zack, libellant's president, and we have examined with minute care the documents referred to in the testimony of these witnesses, and received into evidence, including the independent surveyor's report of Captain Briscoe, who had died before the first trial. What we find is a not unusual amount of contradictions and confusion to be found in many cargo damage cases, especially those where notice of the damage to the cargo is long delayed, as it was here. The cargo owner was obligated to prove more than a suspicion that there might possibly have been some damage to a small part of the shipment. As the trial judge frankly disbelieved at least some of Zack's witnesses, as he had good reason to reject the vague and inconclusive testimony of others as unsatisfactory, and as the documentary evidence was unreliable at best, we think it was

quite proper to dispose of the basic issue of damage at outturn by finding no credible evidence that the 77 bundles of steel involved in this case were discharged from the vessel at Hoboken "either crimped, wet, rusty or in otherwise damaged condition." The alleged crimping was obviously an afterthought, as no reference whatever was made to crimping in the belated notice of claim to the shipowner on November 2, 1953.

Finding 22 necessarily includes a rejection of the contention so vigorously urged by the cargo owner on the previous appeal, to the effect that a tearing of the paper envelope and a breaking or displacement of the waster sheets, if such a condition existed on outturn, might have been the cause of a subsequent rusting of the inner oiled steel sheets such as was discovered at Detroit.

III

Events Subsequent to Outturn

Much of the proof now relied upon by Zack for reversal of the decree relates to what occurred after the bundles of steel strips were unloaded at Hoboken. The argument runs to the effect that the bundles were in such damaged condition at outturn that observations of a number of witnesses who handled the cargo at Weehawken should be taken as proof that the bundles were damaged at outturn in Hoboken. The most direct testimony was given by Krasnov, about which we have already commented. The difficulty with the testimony of Captain Harris and of Foligno, the Erie Railroad checker, and additional documentary evidence relative to this period, is that it is subject to the same infirmities as we have already found in the proofs adduced by the cargo owner concerning conditions found to exist at Hoboken.

The record discloses numerous collateral issues, such as the amount of rain or lack of rain during some of the

various loadings and unloadings of the bundles of steel sheets, and the use of wire slings, rollers, dollies and fork lifts during the discharge of the cargo at Hoboken. We think it not necessary to comment on these issues and other peripheral matters.

The shipowner's motion to assess Zack with the costs of the prior appeal, already paid by the shipowner, is denied. The reversal was based not only on the inadequacy of the findings but also on several erroneous rulings on matters of law, as we have already pointed out. Moreover, the shipowner could have protected the record of dismissal by requesting the trial judge to make appropriate and adequate findings for purposes of review.

Affirmed.

Order on Petition for Rehearing

Petition denied.

H. R. M.

J. J. S.

I. R. K.

U. S. C. JJ.

23 Jan 1963

Order on Petition for Rehearing In Banc.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. Edward Lumbard
Chief Judge

23 Jan 1963

Final Decree Entered on Mandate.

Libellant having appealed to the United States Court of Appeals for the Second Circuit from an order entered January 22, 1962, dismissing the libel, and the Court of Appeals having affirmed such order in a written opinion filed December 12, 1962, and said Court having on February 8, 1963 filed with the Clerk of the District Court a copy of its mandate affirming the order appealed from, and the costs of claimant-respondent in the Court of Appeals having been taxed against libellant in the amount of $301.59, and the costs of respondent-impleaded in the Court of Appeals having been taxed against libellant in the amount of $163.44, and the costs of claimant-respondent in the District Court having been taxed against libellant in the amount of $1,152.75, and the costs of respondent-impleaded having been taxed in the District Court against claimant-respondent in the amount of $253.25

Now, upon the judgment of the United States Court of Appeals for the Second Circuit dated December 12, 1962, it is

ORDERED, ADJUDGED AND DECREED that the said judgment of the Court of Appeals be and it is made the judgment of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that Bristol City Line of Steamships, Ltd., 1 Broadway, New York City, recover from M. W. Zack Metal Company, 250 West 57th Street, New York City and also located at Detroit, Michigan, the sum of $1,454.34, and it is further

ORDERED, ADJUDGED AND DECREED that The Jarka Corporation, 2 Broadway, New York City, recover from Bristol City Line of Steamships, 1 Broadway, New York City the sum of $253.25, and it is further

Final Decree Entered on Mandate:

ORDERED, ADJUDGED AND DECREED that The Jarka Corporation, 2 Broadway, New York City, recover from M. W. Zack Metal Company, 250 West 57th Street, New York City, and also located at Detroit, Michigan, the sum of $163.44, and it is further

ORDERED, ADJUDGED AND DECREED that all bonds and stipulations heretofore filed in this action by or on behalf of claimant-respondent or respondent-impleaded, be and they are hereby cancelled and discharged of record, and claimant-respondent and respondent-impleaded shall have execution for the amounts recited herein.

Dated: New York, New York
February 27, 1963

/s/ ARCHIE O. DAWSON
U. S. D. J.